

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

KEVIN COX d/b/a
COX CONSULTING, LLC,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

FPAB NO. 05- 006

ORDER GRANTING
SUMMARY JUDGMENT

Kevin Cox (Appellant) is challenging Forest Practices Notice of Intent to Disapprove Forest Practices Applications and Notifications (NOID) No. 05-V-TWI issued by the Washington Department of Natural Resources (DNR) for his failure to pay Civil Penalty No. 04-V-TMV. Respondent DNR filed a motion for Summary Judgment seeking dismissal of this appeal on the basis that there are no genuine issues of material fact.

I. BACKGROUND

DNR issued NOID No. 05-V-TWI after Appellant Cox failed to pay Civil Penalty No. 04-V-TMV in the amount of \$10,000 that had been issued to him in a previous case. In the earlier case, Appellant entered a settlement agreement on April 8, 2005 that reduced the amount of his penalty to \$8,500 on the condition that Appellant pay the reduced penalty no later than May 31, 2005. Appellant did not pay the reduced amount by May 31, 2005. This resulted in the

ORDER GRANTING
SUMMARY JUDGMENT
FPAB NO. 05-006

1 full amount of \$10,000 plus interest becoming due and payable on June 1, 2005. Declaration of
2 Jones, October 12, 2005. NOID No. 05-V-TWI, which is the subject of this appeal, was issued
3 on August 12, 2005 after Appellant failed to pay the penalty.

4 It is not in dispute that Civil Penalty No. 04-V-TMV is now a final order. Appellant does
5 not dispute that he did not pay the civil penalty. Appellant does not dispute, and the record
6 establishes, that both Civil Penalty No. 04-V-TMV and NOID 05-V-TWI were issued to Kevin
7 Cox doing business as Cox Consulting L.L.C. The Appellant asserts that NOID 05-V-TWI
8 should have been issued to Cox Consulting, LLC, and not Kevin Cox d.b.a. Cox Consulting,
9 LLC. Cox Notice of Appeal, Filed September 1, 2005.

10 **II. LEGAL ISSUES**

11 As articulated in the Pre-Hearing Order, the legal issues in this case are as follows:

- 12 1. Whether DNR properly issued a Notice of Intent to Disapprove (NOID) to Kevin
13 Cox, d.b.a. Cox Consulting, LLC, for his failure to pay Civil Penalty No. 04-V-
TMV.
- 14 2. Whether the NOID should have been issued to Cox Consulting, LLC only and not
15 to Kevin Cox and Cox Consulting, or Kevin Cox d.b.a. Cox Consulting, LLC.

16 **III. ANALYSIS**

17 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
18 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
19 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary
20 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
21 Summary judgment is appropriate when the only controversy involves the meaning of statutes,

1 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
2 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004
3 (1991).

4 The party moving for summary judgment must show there are no genuine issues of
5 material fact and that the moving party is entitled to judgment as a matter of law. *Magula v.*
6 *Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
7 summary judgment proceeding is one that will affect the outcome under the governing law.
8 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
9 and reasonable inferences must be construed in favor of the nonmoving party as they have been
10 in this case. *Bremerton Public Safety Ass'n. v. City of Bremerton*, 104 Wn.App. 226, 230, 15
11 P.3d 688 (2001).

12 The issue before the Board in this motion is whether challenged NOID No. 05-V-TWI
13 issued by DNR should be upheld as proper. DNR filed its motion for summary judgment on
14 October 14, 2005. Respondent filed no response. Therefore the facts underlying and set forth in
15 DNR's Motion for Summary Judgment are not in dispute.

16 In his appeal notice, Appellant raises issues concerning Civil Penalty No. 04-V-TMV and
17 subsequent appeal. He argues that he was not the operator of record. However, these are matters
18 that were at issue only in the original challenge to the penalty in FPAB No. 04-013. This Board
19 no longer has jurisdiction over that appeal as it has been dismissed. Therefore, arguments
20 concerning the basis for Civil Penalty No. 04-V-TMV may not be raised in this appeal.

21
ORDER GRANTING
SUMMARY JUDGMENT
FPAB NO. 05-006

1 With regard to this case, Appellants appeal statement asserts only that NOID No. 05-V-
2 TWI should have been issued to Cox Consulting LLC only, for the reason that the company was
3 listed as the operator on the forest practices application for the site upon which the civil penalty
4 was issued. However, the civil penalty was issued to Kevin Cox, d.b.a. Cox Consulting LLC.
5 Appellant has failed to provide any factual evidence or make any legal argument whatsoever
6 concerning this assertion. Based on the undisputed facts of this case, and for the purposes of the
7 issuance of this NOID, there is no effective distinction between the individual and the company.
8 In any event, NOID No. 05-V-TWI was issued for Appellant's undisputed failure to pay the
9 penalty he agreed to in settlement of the previous appeal. Therefore his arguments concerning
10 the distinction between himself as an individual and his company are irrelevant to this case.
11 DNR properly named the responsible party in NOID 05-V-TWI.

12 The only other issue before the Board in this case is whether DNR properly issued the
13 NOID 05-V-TWI to Appellant because of his failure to pay Civil Penalty No. 04-V-TMV. Other
14 than his appeal notice, Appellant has made no factual or legal argument directed at the issuance
15 of the NOID No. 05-V-TWI. In the absence of any controverting declarations, the facts
16 contained in the Declaration of Jill Jones on behalf of DNR and the associated materials are
17 unchallenged and must be taken as true. Also, the Appellant conceded that he has not paid the
18 assessed fine.

19 If the party moving for summary judgment shows that there are no genuine issues of
20 material fact, the moving party is entitled to judgment as a matter of law. *Magjula*, 131 Wn.2d at

1 182; 930 P.2d 307. When a forest practices penalty is imposed and an appeal of that penalty has
2 been filed, the penalty becomes due and payable upon completion of the administrative and
3 judicial review, if any. RCW 76.09.170(5). Appellant's full penalty from the earlier case
4 became due and payable upon completion of the prior administrative review process. In this
5 case, the single issue in this case is whether NOID No. 05-V-TWI was properly issued to
6 Appellant for failure to pay the full \$10,000 penalty. The civil penalty DNR assessed on June
7 14, 2004 is now a final order. The legislature has provided the DNR with enforcement powers to
8 enforce its final orders. RCW 76.09.140(1). Appellant concedes that he has not paid the
9 penalty. Thus there are no genuine issues of material fact in this case regarding either the penalty
10 or the amount due and owing. DNR has the statutory option of issuing a NOID upon such failure
11 to pay outstanding civil penalties, and thus properly issued NOID 05-V-TWI to Appellant.

12 Based on the foregoing analysis of the facts and the issue, the Board enters the following

13 **ORDER**

14 In accordance with the analysis above, summary judgment is GRANTED on all issues in
15 favor of Respondent Department of Natural Resources. The case is, therefore, DISMISSED with
16 prejudice.

17 SO ORDERED this 13th day of December 2005.

18 FOREST PRACTICES APPEALS BOARD

19 Tom P. May, Chair

20 John Giese, Member

21 ORDER GRANTING
SUMMARY JUDGMENT
FPAB NO. 05-006

Joel Rupley, Member
Cassandra Noble
Administrative Appeals Judge, Presiding